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Neo-Colonial Relationships Gone Wrong: French Leaders Should Be Held Legally Responsible for their Role in the Rwandan Genocide

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Abstract

This article explores the role of outside government intervention in civil war conflicts and the ability of these government actors to be held responsible for crimes committed by association and assistance to war criminals. By using the example of the French/Rwandan relationship and the criminal responsibility that France may have for its association and assistance to the Hutu majority government, it looks to the pitfalls that many western countries could find themselves in by assuming similar roles with other repressive and unstable regimes. This analysis proves particularly timely as lawyers for six Rwandan citizens recently filed a lawsuit with the Army Tribunal of Paris alleging that French soldiers had a role in the 1994 Rwanda genocide. Exploring various contemporary theories of criminal responsibility including complicity and other forms of indirect criminal responsibility, the analysis shows that if the allegations against French officials responsible for Operation Turquoise and the accompanying diplomatic and arms support are true, they could be held criminally liable for their participation in the Rwandan genocide of 1994. Beginning by laying the foundation of the history of the conflict and subsequent genocide as well as the facts surrounding France's role before and during this conflict, the article sets out a case for the culpability of France. Briefly exploring jurisdictional issues, the analysis moves on to examine three theories of culpability; complicity in genocide, joint criminal enterprise, and command responsibility. Upon making a strong case under each of these international legal theories the paper then compares the Rwandan incident with other incidences of neo-colonialism or imperialism both in past and present times. Finally, the article concludes by stating the need for global accountability in our responsibility to not participate in actions against humanity.

Neo-Colonial Relationships Gone Wrong: *French Leaders Should Be Held Legally Responsible for their Role in the Rwandan Genocide*

“It seems...inconceivable that one can watch...thousands of people being....massacred....every day....and remain passive.” – General Romeo Dallaire

The events that occurred in Rwanda from April 1994 through June 1994 were some of the most horrific of the 20th century. Although the killing was low tech – mainly by machete – the killers were quite effective. Over 800,000 people were dead in only 100 days. The dead in Rwanda accumulated at nearly three times the rate of the dead in the Holocaust. It is the most efficient mass killing to date since the atomic bombings of Hiroshima and Nagasaki.¹ While the atrocities themselves are overwhelming to comprehend, the reaction by the international community to the atrocities being committed is equally difficult to understand. Both the United Nations (UN) and the United States government (US) have been widely criticized for their lack of action during the genocides. However, it is important to remember that it was not only the UN and the US who did not act, but in fact, the entire international community who turned their back on the crisis unfolding in Rwanda. It is widely thought that “international involvement in the Rwanda genocide was a profoundly disturbing case of inaction, where military force was too little and too late”.² The only action which was finally taken seems to be that of France near the end of crisis, in June of 1994, when the French government sent troops into Rwanda to help control the situation. However, this intervention by France looked suspicious to many international observers. Some observed that France was the “least appropriate country to intervene” due to its warm relationship with the Hutu-led government.³ Worse than these general observations are

reports regarding the actions and inaction of French troops while on the ground in Rwanda.

The purpose of the following analysis is to explore the role of outside government intervention in civil war conflicts and the ability of these government actors to be held responsible for crimes committed by association and assistance to war criminals. Many developed nations hold neocolonial relationships with repressive regimes of developing nations in order to benefit financially through trade and investment opportunities. It is important for these nations to recognize that they may hold some measure of responsibility for criminal acts of regime governments depending on the specific nature of their relationship.

Specifically, the analysis will focus on the case of French intervention in the Rwanda crisis to support a theory of individual criminal responsibility. This analysis proves particularly timely as lawyers for six Rwandan citizens recently filed a lawsuit with the Army Tribunal of Paris alleging that French soldiers had a role in the 1994 Rwanda genocide.⁴ Using the example of the French/Rwandan relationship and the criminal responsibility that France may have for its association and assistance to the Hutu majority government, it is possible to see the pitfalls that many western countries may find themselves in by assuming similar roles with other repressive and unstable regimes. Exploring various contemporary theories of criminal responsibility including complicity and other forms of indirect criminal responsibility, the analysis will show that if the allegations against French officials responsible for Operation Turquoise and

the accompanying diplomatic and arms support are true, they could be held criminally liable for their participation in the Rwandan genocide of 1994.

I) SETTING THE BACKDROP: THE GENOCIDE AND FRENCH INVOLVEMENT

Historical Overview

On April 6, 1994 the plane of Rwandan President Habyarimana and Burundian President Ntaryamira was shot down and all aboard were killed.⁵ While it has never been proven that President Habyarimana's own Hutu party was responsible for his death, many facts point to that possibility. Habyarimana had been compelled by popular pressure to make substantial concessions to reform-minded oppositionists, and Habyarimana's extremist entourage was very concerned that Rwanda was slipping toward moderation.⁶ The final straw for the Hutu extremists was Habyarimana signing the Arusha Accords in August of 1993. This signature amounted to a political suicide note.⁷ Hutu leaders charged treason, saying that Habyarimana had become an accomplice to the treason.⁸ As well, there seemed to be a lot of chatter regarding the imminent death of the President.

Hassan Ngeze was telling anybody who would buy his newspaper. In the March issue of *Kangura*, he ran the banner headline "HABYARIMANA WILL DIE IN MARCH." An accompanying cartoon depicted the President as a Tutsi-loving RPF accomplice...*Kangura* proposed a scenario strikingly similar to the schemes described by the informant in (General) Dallaire's fax (to the Department of Peacekeeping Operations at UN headquarters in New York, describing an informant's description of preparations for genocide, large storing of imported arms and lack of Habyarimana's control over his party) – the President assassinated 'during a mass celebration' or 'during a meeting with his leaders.' The article opened with the words 'Nothing happens that we did not predict,' and ended, 'Nobody likes Habyarimana's life better than he does. The important thing is to tell him how he will be killed.'⁹

The assassination of Habyarimana certainly was a boost to the Hutu power leaders. The removal of Habyarimana eliminated both him and his threat of moderation as well as inciting a violent response from the Hutu majority in return for the death of their fallen President.

However, the story of the Rwanda genocide did not begin on April 6, 1994.¹⁰ While no one knows the exact origins of the Hutu, Tutsi, and Twa peoples (the latter representing only one percent of Rwanda's population), there is little evidence of deep-rooted or ancient hatreds among these castes prior to colonial rule.¹¹ With the onset of colonial rule, Tutsi, despite their minority status, gained greater economic and social status over the Hutu, particularly through a division of labor that gave many Tutsi control over cattle and left hard labor to Hutu agriculturalists.¹² During this period both Belgium and France became closely aligned with the majority Hutu against the Tutsi minority.¹³ In the late 1950s to early 1960s, Rwanda became a more polarized ethnic state with the Hutu majority periodically and systematically attacking the Tutsi population, prompting streams of Tutsi refugees to neighboring countries.¹⁴ In October of 1990, the Rwandan Patriotic Front (RPF), made up of Tutsi in exile, attacked Rwanda.¹⁵ The Habyarimana regime, which had been losing political power due to negative economic conditions in the 1980s, took steps to preserve its power.¹⁶ As a result, a civil war broke out and mass killings began occurring in 1990 through 1993.¹⁷ In an attempt to halt the violence, on August 4, 1993, the Rwandan government and the RPF signed the Arusha Accords, a group of agreements and protocols negotiated between 1990 and 1993.¹⁸ The United Nations Security Council established the United Nations Assistance Mission in Rwanda

(UNAMIR), a peacekeeping force of 2,500, to oversee the implementation of the peace accords.¹⁹ In 1994, the Rwandan population was made up of eighty-five percent Hutu, fourteen percent Tutsi, and one percent other ethnic groups, such as the Twa.²⁰

French Involvement in the Conflict

In 1975 the French Government, eager to expand its neocolonial African empire, began military assistance to Habyarimana's government.²¹ Thus, began the friendly and cooperative relationship between the two governments and their leaders. This relationship continued throughout Habyarimana's life, and even past it, as the French continued to back the Hutu government throughout the genocide and civil war. Despite reports of violence against Tutsi and a growing pattern of exclusion from every segment of society, the French continued their support of Habyarimana's government with both troops and arms in the early 1990's.²² In 1990, hundreds of well equipped French troops were fighting alongside Habyarimana's army to hold off the RPF's advancement.²³ In 1990 to 1991, amid continuing massacres of Tutsi, the Rwandan army began to train and arm civilian militias known as the *Interahamwe* ("those who stand together").²⁴ Although a military agreement was signed in 1975 between France and Rwanda which forbade the involvement of French troops in Rwandan combat, training or police operations, the French funneled huge shipments of armaments to Rwanda though the early 1990s, all the way through the genocide of 1994.²⁵ As well, throughout the early 1990's French officers and troops served as Rwandan auxiliaries.²⁶ In 1991, as the RPF was making advances into Habyiramana's home territory, government troops, including French paratroopers drove them out.²⁷ And, in fact, when the US government suggested

Kirsten Bowman

that Rwanda should do away with its ethnic identity cards, in order to promote unity, the French squashed the idea quickly.²⁸

With such strong support from the French, the Habyarimana government was able to leave the fighting of the RPF to the French troops and concentrate instead on their campaign against Tutsi civilians.²⁹ In early March of 1992 militia members in the Bugesera region slaughtered three hundred Tutsi in three days.³⁰ Similar killings occurred at the same time in Gisenyi and in August – after Habyarimana signed a cease fire with the RPF - Tutsi were again massacred in Kibuye.³¹ As the slaughter of the Tutsi population continued through the early 1990's, the foreign aid money continued to pour into Habyarimana's government, and weapons continued to arrive, supplied mainly by France, although Egypt and South Africa lent a hand as well.³²

With these very close ties to high ranking Rwandan governmental officials and with their undercover intelligence operations in place, *Human Rights Watch* suggests that it is nearly a certainty that France knew of the preparations for killing the Tutsi and Hutu moderates.³³ In fact, it is documented that French diplomats and military officers were discussing the possibility of genocide in Rwanda in early 1990 and former French Ambassador Martres said that the genocide was foreseen in early 1993.³⁴ However, France was loyal to its Rwandan ties and continued its support of the Rwandan government diplomatically through the Security Council as well as militarily with its continued supply of arms.³⁵ One example of this was Boutros-Ghali's hope that France, Belgium and the U.S. would support him in his efforts to halt the Hutus preparations for

violence. It is reported that it was France who refused to address the issue within the Security Council.³⁶

Once the genocide began in April of 1994, the main discussion among the UN, Belgium and France was the evacuation of their troops. The Belgian and French governments decided quite quickly that troops under their control would not attempt to restore order in Rwanda, and instead focused on evacuating only their own troops as quickly as possible from the area.³⁷ While the French were in a position to save many Tutsi due to their relative ease at moving around the cities and the country and the cheers with which they were greeted from the Hutu militia, they choose to save only a few Rwandans, all of whom were closely linked to the Habyarimana government.³⁸

Even as the number of victims of genocide mounted, French officials such as President Mitterrand, General Quesnot and General Huchon - both of whom headed the French military - pursued the goal of assuring the heirs of Habyarimana the predominant political role in Rwanda.³⁹ They unquestioningly equated the ethnic majority to the political majority, and never doubted that the Hutu had the right to dominate political life.⁴⁰ The Hutu government recognized the necessity of continued French support to their efforts against the Tutsi and kept French Ambassador Jean-Michel Marlaud well informed of their progress in the fight.⁴¹ Although French soldiers were supposed to have left Rwanda in December of 1993 as part of the terms of the Arusha Accords, in actuality forty to seventy soldiers remained in Rwanda.⁴² There is no account of what role was played by these French advisers during the first days of the crises, when the officers that

they had been training were ordering their troops to slaughter civilian Tutsi and moderate Hutus.⁴³ It is thought that the French officials within the country were well-acquainted with Rwandan military leaders and well-placed to influence them, although there was apparently no attempt to do so.⁴⁴ The last of the French troops were officially withdrawn on April 14.⁴⁵

Although the troops withdrew by April 14th, it seems clear that Mitterrand's administration was continuing to support the Hutu regime, and thus in effect, the genocidal actions taken by the regime both in diplomatic influence as well as in deliveries of arms. While official deliveries of arms by the French government are supposedly regulated by defined rules, in the case of Rwanda, the rules were rarely followed.⁴⁶ Speaking privately, many French military officials indicated that deliveries of weapons by French actors took place while the genocide was going on.⁴⁷ In fact, according to a U.N. military observer, one of the three French planes involved in the evacuation also brought cases of ammunition for the Hutu majority.⁴⁸ French officials told UNAMIR that the plane would land 2 hours later than it was actually scheduled, and Rwandan soldiers who were correctly informed of the time, were there to unload the ammunition and take it away for use by the Hutu majority effort.⁴⁹ The Human Rights Watch Arms Division researched the situation and reported back:

The French government and French companies operating under government license delivered arms to the Rwandan forces five times in May and June through the town of Goma, just across the border from Gisenyi, in Zaire. The first of these shipments may have taken place before May 17, when the Security Council imposed an embargo on the supply of arms to the interim government, but it was still done in disregard of its April 30 appeal to refrain from providing arms or any military assistance to the parties to the conflict. On one of the dates in question,

May 25, a plane from Malta landed at Goma with a single passenger, T. Bagosora (General of the Rwanda Hutu army), in addition to its cargo.⁵⁰

By the beginning of May, France began planning for a military intervention in order to slow the advance of the RPF and prop up the interim government.⁵¹ The French had a great interest in keeping their allies, the Hutu government in place in Rwanda. According to accounts from Philip Gourevitch, France was desperate for an opportunity to rescue its investment in Rwanda, and “communication between Paris and Kigali was constant, if not downright conspiratorial”.⁵² However, the fact that by this time the genocide was an international concern made any move by the French to help the Hutu government to stay in power politically risky. The French press was hounding the French political and military administrations with stories of blatant complicity in the preparation and implementation of the genocide.⁵³ The French therefore ended up billing their move into Rwanda as a humanitarian mission and was able to get the U.N., desperate for help, to sign on.⁵⁴

By mid-June President Mitterrand finally pushed *Operation Turquoise* into action. The Security Council endorsed the ‘impartial’ French deployment and allowed the mission the ability to use aggressive force, which had been denied to UNAMIR.⁵⁵ Thus, France declared its intention to turn all of Rwanda into a safe zone, but the question remained; safe for whom?⁵⁶ In fact, France’s ex-President Valery Giscard d’Estaing accused the French military of protecting those who had carried out the genocide.⁵⁷ This, indeed, appeared to be the case. While it cannot be denied that French presence in western Rwanda, where the French brought their media to watch and report, saved many Tutsi,

thousands more continued to be killed in French-occupied zones.⁵⁸ It seems that from the moment they arrived, and wherever they went “the French forces supported and preserved the same local political leaders who had presided over the genocide”.⁵⁹ Many human rights NGO’s and individual observers would later look to *Operation Turquoise* and say that the “signal achievement of the operation was to permit the slaughter of Tutsi to continue for an extra month, and to secure safe passage for the genocidal command to cross, with a lot of its weaponry, into Zaire.”⁶⁰

II) RESPONSIBILITY OF FRENCH OFFICIALS FOR THEIR PART IN THE GENOCIDE

Jurisdiction

French individuals complicit in these events could be tried either in a national court or military tribunal or in the International Criminal Tribunal for Rwanda (ICTR).⁶¹ Universal jurisdiction under customary international law gives States the right to use their domestic courts to prosecute war criminals, as well as the crimes of genocide and crimes against humanity committed outside of war.⁶² Thus, under the theory of universal jurisdiction, a State can prosecute a war criminal irrespective of their nationality or place of the commission of the offense, or any link between the prosecuting State and the war criminal.⁶³ Therefore, under a theory of universal jurisdiction, various interested national courts⁶⁴ would be able to try French military leaders and diplomats for their involvement in the genocides of 1994.⁶⁵

The ICTR would also have jurisdiction over French officials involved in the Rwanda genocide. The ICTR holds jurisdiction over natural persons for serious violations of international humanitarian law.⁶⁶ Thus, the tribunal holds jurisdiction over individual persons, but not government entities, political parties and the like.⁶⁷ The territorial jurisdiction of the ICTR extends to “the territory of Rwanda including its land surface and airspace, as well as to the territory of neighboring States in respect of serious violations of international humanitarian law {committed by Rwandan citizens}”.⁶⁸ The last part of the provision is a limitation on jurisdiction specifically for acts in neighboring countries.⁶⁹ Thus, if the acts occurred outside of Rwanda, the tribunal would only have jurisdiction over Rwandan citizens, but if the acts happened within Rwanda territory the tribunal has jurisdiction over all natural persons. The final jurisdictional limitation of the ICTR is the temporal jurisdiction limitation which reads, “The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994”.⁷⁰ Thus the territorial and temporal jurisdictional limits that are placed on the tribunal would only allow for prosecution of French actions which took place in Rwanda during the year of 1994.

Despite any jurisdictional or immunity limitations, it is certainly possible and likely that, through either the jurisdiction of the ICTR or universal jurisdiction, French actors who participated and contributed to the Hutu Power acts of brutality against the Tutsi could be held responsible under various forms of liability through indirect responsibility. Under article 6 of the ICTR a superior can be held individually

responsible for the acts of a subordinate⁷¹ or for the aiding and abetting in the planning, preparation or execution of crimes⁷² and the official position of a person will not relieve them from responsibility.⁷³ Further, the ICTR has adopted the language of the Genocide Convention in Article 2 of its statute which includes the ability to punish an individual for complicity in genocide.

Complicity in Genocide

Under both the Genocide Convention and the ICTR Statute complicity in genocide is a punishable act.⁷⁴ In fact, participation by complicity in the most serious violations of international humanitarian law was considered a crime as early as Nuremberg.⁷⁵ The Chamber in the Prosecutor v. Akayesu noted that complicity is viewed as a form of criminal participation by all criminal law systems. Further, since the accomplice to an offense may be defined as someone who associates himself in an offence committed by another, complicity necessarily implies the existence of a principal offense.⁷⁶

It has been stated that the events in Rwanda during the spring and summer of 1994 were the clearest example of genocide since the Jewish holocaust during World War II.⁷⁷ The ICTR Chambers have found many defendants guilty of various forms of genocide and there are many more defendants still to be tried for genocidal crimes. In the case of Prosecutor v. Kayishema the Chamber analyzed the crimes of genocide by identifying and analyzing the *mens rea* and *actus reus* for the crime. The Chamber identified the *mens rea* of the crime of genocide as the specific intent to destroy a group in whole or in part.⁷⁸ As well, they found that for the crime of genocide to occur, the

intent must be formed prior to the acts of genocide.⁷⁹ They clarified though, that the acts do not require premeditation, only that the act is done in furtherance of the genocidal intent.⁸⁰ In order to find proof of the intent the court can look to either words or deeds to establish this intent. From there, the Chamber also looked at what the destruction of a group means specifically. They concurred with the view of the International Law Commission which stated that “it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe”.⁸¹ Thus the Trial Chamber in the *Kayishema* case was of the opinion that the phrase “destruction of a group in whole or in part” requires the intention to destroy a considerable number of individuals who are part of a group.⁸² As well, these individuals must be targeted due to their membership in that particular group.⁸³

When looking to the *actus reus* element of genocide the Chamber in the *Kayishema* case looked to the list of acts listed in the statute. They specifically were able to clarify what the words “killing members of the group” meant. While debating the meaning of the words killing, homicide and the French word *meurtre*, the court found that “there is virtually no difference between the term killing in the English version and *meurtre* in the French version of Article 2 of the statute.....hence killing and *meurtre* should be considered along with the specific intent of genocide”.⁸⁴ Upon analysis of the crime of genocide and the *mens rea* and *actus reus*, the Trial Chambers of the ICTR have found on many occasions that the perpetrators of the massacres in Rwanda had the requisite *mens rea* and *actus reus* to be found guilty of genocide.⁸⁵ Thus, the underlying crime

of genocide is easily found and the principle offense is established in the case against French actors.

Once genocide has been established, it is then necessary to complete an analysis of the elements of complicity. Because the statute provision Article 2(3)e, while stating that complicity in genocide is a recognized criminal offense, does not seek to define the elements of the crime, the Chamber in *Akayesu* defined complicity taking into account both common and civil law systems as well as looking specifically at the Rwandan Penal Code.⁸⁶ After assessing each of the various systems the Chamber defined the elements of complicity in genocide as 1) complicity in procuring means, such as weapons.....used to commit genocide, with the accomplice knowing that such means would be used for such a purpose; and 2) complicity in aiding or abetting in the planning or enabling of genocide.⁸⁷

The *mens rea* element requires that the accomplice must have acted knowingly. It is not necessary for the accomplice to have the specific intent to destroy the group, only that the accomplice acted while they knew or had reason to know that the principal was acting with genocidal intent.⁸⁸

It seems unlikely that any of the French military or political officials would be able to claim that they did not have knowledge of the genocide occurring in Rwanda. As was discussed earlier, French officials began discussing the threat of genocide in Rwanda in 1990, and former French Ambassador Martres claimed that genocide was foreseen in

1993.⁸⁹ Therefore, providing that the accounts of French actions before and during the genocide are accurate, it would likely be found that the French were well aware that their actions leading up to the events in April of 1994 were enabling the Hutu power base to plan and implement the genocide. Further, by the end of April it seems irrefutable that any country could claim a lack of knowledge of the genocide which was being perpetrated in Rwanda. Throughout the first weeks of killing, international leaders refused to talk of genocide, quite possibly because they feared the legal and moral obligations that would follow from recognizing that the crime was being committed.⁹⁰ However, by the end of April, the word “genocide” was popping up in speeches of various world leaders regardless of the international community’s reticence to use it. The Pope used the word “genocide” to condemn the violence on April 27. The UN Secretary General, Boutros-Ghali followed with the use of the term a few days later and even French Minister Alain Juppe used the word to describe the events taking place in Rwanda in early May at a meeting of the European Union.⁹¹ It would be awfully difficult for any of the French officials, whether diplomatic or military, to claim that they did not have a knowledge and understanding of what was occurring in Rwanda. Still they allegedly provided arms to the Hutu majority. Thus, by supplying arms with the knowledge that the Hutu were carrying out genocide with the help of those arms, the French have met the elements of complicity in genocide by their actions.

It is important as well to note that the Chamber in *Akayesu* specifically distinguishes the crime of complicity in genocide from aiding and abetting by requiring a positive,

affirmative action for complicity, while aiding and abetting can be found in failing to act or an omission.⁹² However, to find aiding and abetting the *mens rea* element is only found when the accused has the specific intent to destroy the group.⁹³ Under these guidelines, French actors in Rwanda during Operation Turquoise cannot be held responsible under a complicity theory for merely failing to act to stop the genocide.⁹⁴ Thus, under the complicity theory, if the reported actions of the French are accurate they could be held liable under this theory for diplomatic assistance, arms assistance, and any actions that were taken on the ground during the operation to provide Hutu leaders cover to finish their genocidal actions, but cannot be held responsible for inaction.

The French could argue that they did intervene to save many Tutsi lives.⁹⁵ And, it cannot be argued that their presence in Rwanda did not save Tutsi lives. However, their presence in the country also provided cover for many more Tutsi lives to be taken, as the Hutu's spent the last month of the genocide focusing on carrying out the killing of the remaining Tutsi when they understood that the RPF would most likely win.⁹⁶ At that point, they focused their military power not on holding off the RPF, and instead allowed the French troops to take over more of the civil war work, enabling them to focus their attention on the genocidal killing of Tutsi.⁹⁷ Assuming the accounts of French actions toward Rwanda in the year of 1994 are accurate, their actions both within Rwanda and diplomatically on the Hutu Power government's behalf, coupled with their funneling of arms to the Hutu power base strongly suggests that French

military and political leaders should be held accountable for complicity in genocide under the Statute of the ICTR.

Joint Criminal Enterprise

Article 7 of the ICTY and Article 5 of the ICTR statute authorize accomplice liability, providing for individual responsibility for substantive offenses for persons who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of the offense.⁹⁸ Within this constellation, the ICTY has identified Joint Criminal Enterprise (JCE) as another form of indirect liability. While the ICTR has not applied individual criminal responsibility in a JCE theory as of yet, it is implicit in the section of the ICTR statute dealing with accomplice liability. As well, the ICTY has successfully applied it in numerous cases.

The ICTY in *Prosecutor v. Tadic* identified three categories of joint activity that could subject a perpetrator to liability for the acts of others. First are the cases where all co-defendants, acting with a common plan, possess the same criminal intent.⁹⁹ A second category derives from World War II's classic concentration camp scenario, where members of military or administrative units act pursuant to a common plan, each with the requisite mental element deriving from knowledge of the system and intent to further the common design.¹⁰⁰ A third category where joint criminal enterprise might be found are offenses that do not necessarily fall within a common plan or are not the object of a common criminal purpose, yet the defendants actions furthered the joint criminal enterprise and thus culpability exists.¹⁰¹ A main reason to separate these types

of joint criminal enterprise into the three categories is that the *mens rea* requirement for each of the categories is different. The French involvement in Rwanda fits most closely into the third category of possible joint criminal enterprise liability and thus, it is necessary to find the requisite *mens rea* which attaches to that category. In the instance of joint criminal enterprises which are not the object of a common plan or criminal purpose, liability attaches if two factors are present. First, the accused must possess the intention to take part in a joint criminal enterprise and to further the criminal purpose of that enterprise.¹⁰² Secondly, the offenses committed by members of the group must be foreseeable.¹⁰³

While France may not have had the exact same common plan in the genocide of the Tutsi population, it is possible to find the requisite *mens rea* of intention to take part in and further the enterprise. As well, the genocide committed by other members of the joint criminal enterprise was certainly foreseeable. Assuming that the accounts of French involvement with the Hutu majority government are accurate, France's interest in helping the Hutu's to stay in power and fight against the RPF was a major driving force behind their actions during the lead up and actual events of the genocide. By transferring weapons to the Hutu government and helping to train their soldiers before the genocide began in the interest of helping to keep the Hutu majority in power a court would likely find the requisite intent to further the enterprise of the Hutus Power base. The second element required to find the *mens rea* here, would also be easily found, if the accounts of events are accurate. Because it has been documented that the French were well aware of the possibility of genocide breaking out against the Tutsi in the

early 90's building up to the actual genocide of 1994, it would certainly be foreseeable to them that the training that they were providing, along with diplomatic cover and large arms transfers would be used in the criminal outcome of genocide.

Upon finding the requisite *mens rea* for liability under joint criminal enterprise, it is still necessary to look to the *actus reus* elements of the criminal theory. During the *Krstic* case at the ICTY the trial chamber laid out the three *actus reus* elements required for a finding of joint criminal enterprise.¹⁰⁴ There must be a plurality of persons; the existence of a common plan which amounts to or involves the commission of a crime provided for in the statute; and participation of the accused in the execution of the common plan.¹⁰⁵ In regards to the second element of the existence of a common plan, the Chambers specified that it is not necessary for this plan, design or purpose to have been previously arranged or formulated.¹⁰⁶ The common plan or purpose may be inferred from the fact that a plurality of person are acting in unison.¹⁰⁷

The plurality of persons element involved in the Rwandan genocides is very clear. The crime of genocide was committed by many Rwandan actors, and the joint criminal enterprise would include those that actually committed the acts of genocide as well as those who acted to aid in the actions of the perpetrators. In this case those actors would be namely those French officials who supported the Hutus through transfer of weapons and the provision of diplomatic and military support. The existence of the common plan certainly seems to be an element easily met. It is important to remember that the French need not have participated in the planning of the genocide, it is enough that the

plan of genocide existed and that the French knew or should have known of the plan. The accountings of the genocide clearly indicated that the Hutu had planned the genocide well in advance and that the French had every indication of the possibility of genocide in Rwanda leading up to the events of 1994 and certainly were aware of the genocide occurring during the months of April through June of 1994. Finally, the last element of the *actus reus* requirement is met as long as the accounting of French involvement are indeed accurate. According to the accounts, the French participated in the commission of the crime of genocide by providing diplomatic cover, military assistance and the supply of weapons to the Hutu power base. Having met all of the elements for both the *mens rea* and *actus reus* of joint criminal enterprise, it would seem likely that individual French actors could also be held criminally responsible under this theory of joint criminal enterprise for working with the Hutus and aiding them in their fight to destroy the Tutsi population.

Command Responsibility

A third theory of individual criminal responsibility for the French military commanders is the theory of command responsibility. This doctrine holds that a commanding officer can be held liable for the acts of another, or for failing to prevent another from committing an illegal act.¹⁰⁸ Thus, under this doctrine, a military commander may be held liable for the actions of those under his control. Under Geneva Protocol I in 1977, it was determined that a commander could be held responsible for violations of international law perpetuated by his or her subordinates, if the commander knew, or should have known that the crime would be committed and did nothing to prevent the

crime from being committed.¹⁰⁹ As well, the Rome statute of the International Criminal Court (ICC) states that a military or civilian commander can be held liable in the ICC for the criminal acts of his or her subordinates if the commander knew the act would be committed and did not take reasonable steps to prevent the crime from being committed.¹¹⁰

The Chamber in the *Kayishema* case at the ICTR first considered whether Kayishema would be subject to the notion of command responsibility due to his role as a non-military commander. This is a relevant analysis to look at in comparison to the French commander's role. While the French on the ground in Rwanda during *Operation Turquoise* were with the French military, they were not a part of the Rwandan military and thus their position as commander is a more difficult question to answer. The Chamber notes that the crucial question was not the civilian or military status of the accused, but rather the degree of authority exercised over subordinates.¹¹¹ Thus, it is not necessary to be a part of the Rwandan military in order to be held responsible under a theory of command responsibility. Following this finding, a French military officer would be able, if all other requirements were met, to be charged and found guilty under this theory.

However, in order to hold French officials responsible under the Command Responsibility doctrine it is also necessary to identify who the commanders in control were. There were many various commanders named throughout the operation, with

General Jean-Claude Lafourcade being the Commander of *Operation Turquoise* and therefore having complete responsibility for the mission.¹¹²

After laying out the parameters for deciding who would constitute a superior, the *Kayishema* Judges next considered who would constitute subordinates over whom a superior would exercise command. Inherent in this discussion, it is necessary to look at *de jure* versus *de facto* command, and which is necessary to establish command responsibility. The Chamber set out the guiding principle by stating that, “the doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates”.¹¹³ Therefore, in order to follow that most important principle and in view of the chaotic situation in Rwanda, the Chamber asserted that they must be free to consider whether the requisite control was established by either *de jure* or *de facto* command.¹¹⁴ In making this decision they cited both case law and the Rome Statute to support the ability to look at both *de jure* and *de facto* command responsibility.¹¹⁵ The Rome Statute stipulates in Article 28(2) that all other superiors shall be criminally responsible for acts committed by subordinates under his or her effective control.¹¹⁶ Further the Chamber noted that Article 6 of the Rwanda Tribunal’s Statute was formulated to include responsibility of all government officials, all superiors and all those acting pursuant to orders.¹¹⁷ Thus, the statute was designed to ensure that those culpable under the Statute would not be able to escape responsibility through legalistic formalities.¹¹⁸

Under the Chambers rationale in *Kayishema* and the Rwandan Statute it is necessary to find that the French has a superior relationship to the Hutu military, as well as to find the necessary elements of 'knowledge' and 'failure to prevent and punish' that are set out in Article 6(3) of the Statute.¹¹⁹ The most difficult hurdle in a case for French liability under a command responsibility theory is the finding of a superior relationship over the Hutu military members by *Operation Turquoise*. However, if the facts documented on the ground in Rwanda are true, it would likely be found that this relationship existed. Under the facts given, the French would not have *de jure* command over the Hutu troops, but a finding of *de facto* command is likely. *Operation Turquoise* landed in Rwanda in June of 1994 and immediately and quickly established French authority over the part of Rwanda still controlled by the Rwandan government forces, which were those Hutu government forces that were taking part in and requiring Hutu civilians to take part in the massacres.¹²⁰ Even before *Operation Turquoise* though there are early accounts of French military command over the Hutu militia. "French military officers trained the killers in the genocide," De Saint-Exupéry says in his book 'L'Inavouable - La France in Ruanda' (The unspeakable - France in Rwanda). "They did that on orders, by teaching the Rwandan army counter-insurgency strategies and tactics."¹²¹ As well it has been documented that the French soldiers were protecting the Hutu killers as the RPF advanced. In one of many documented acts of the French military helping the Hutu government soldiers to escape to Zaire near the end of the genocide, a French convoy consisting of about twenty five vehicles left Butare, and the RPF forces ambushed it, stopping the convoy and insisting upon inspection of the vehicles. The French refused and a tense conflict ensued. Eventually,

the French were required to allow inspection, only through force. Upon inspection Hutu government soldiers were found hiding in the vehicles.¹²² As well, there were numerous evacuations planned and carried out by the French.¹²³ These evacuations were most certainly known of and approved by General Jean-Claude Lafourcade. In fact, Pierre Banner who headed the parliamentary commission admits now that France was heavily involved in leading the Rwandan army. "We did support a racist army, and didn't take the necessary distance at the moment of the genocide. I think France would do a good thing in accepting its responsibility."¹²⁴

Upon the finding of both superior and subordinate relationships it is still necessary to find the *mens rea* required by the doctrine, which requires that the superior know or have had reason to know of the subordinates criminal activities. It is not likely that it would be necessary to look to whether the French commanders should have known of the massacres. Much of the accounts of French involvement concur that both the French government and even more specifically French military officers on the ground in Rwanda knew of the preparations and the carrying out of the genocide by the Rwanda Hutu militia. Classified documents and testimonies from international observers confirm that the French government knew of Hutu plans to carry out the massacres.¹²⁵ French military officers posted with the Rwandan army in their headquarters "necessarily knew what was going on in the Rwanda military structures, they were fully informed that massacres were in preparation," says Romeo Dallaire, the Canadian general who headed the UN mission sent to Rwanda in 1993.¹²⁶

Finally, it is recognized under the statute that the superior is responsible if they failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.¹²⁷ Clearly the French commanders did little to stop the Hutu killers and in fact it is documented that they helped the Hutu killers to escape to the Zaire refugee camps after the genocides and while the RPF was advancing against them.

III) APPLYING THE FRENCH CULPABILITY TO THE BROADER ISSUE OF NEO-COLONIAL RELATIONSHIPS

Kwame Nkrumah, the first president of Ghana, coined the term "neocolonialism" to characterize the way in which the End of Empire is anything but an end to Western imperialism.¹²⁸ One flag comes down, another goes up, but developing national economies are still controlled by western interests and thus the great Age of Empires has not really ended, it has simply morphed into a new form.¹²⁹ Today we see throughout the globe the existence of neocolonialism and the repercussions from it which wreak havoc on the developing nations of the world. From the Belgians to the French to the Soviets to the Americans to the British – the world is full of examples of imperialist nations developing relationships with regimes in order to help their own economic interests. This form of neocolonialism can be harmful enough, but when situations such as the Rwandan genocide of 1994 arise, the fallout from these relationships can be drastic. By taking a stand against these unhealthy relationships and providing consequences to imperialist nations, the global community would give these nations cause to think twice before implicating themselves in the actions of regimes whom they cannot completely control.

Each of the traditional justifications for punishment – retribution, deterrence, isolation from society and rehabilitation – has been mentioned as an important objective in establishing international tribunals.¹³⁰ The *Kupreskic* Trial Chamber inferred that retribution and deterrence were the two main purposes to be considered when deciding sentencing at the ICTY.¹³¹ Given that deterrence is clearly an objective of the United Nations when dealing with international crimes, it would seem an important step to hold countries who are involved - whether through complicity or other forms of indirect involvement such as arms sales - responsible for their actions. By using the French as an example, the global community would be put on notice that their activities within developing nations will be more closely scrutinized and that irresponsible actions or relationships leading to international criminal acts will no longer be tolerated. For this reason alone, prosecuting those French responsible for assisting the Hutu through indirect support or complicity, seems essential to the integrity of international criminal law.

When looking to other examples of past and present versions of imperialism or neocolonialism around the globe it becomes evident that harm is being done on a large scale without global accountability.

An Early Look at Neocolonial Relationships: Guatemala – 1954

Plotting for the overthrow of the Guatemalan government of President Jacobo Arbenz began in 1952 during the Truman administration.¹³² Arbenz was committed to modernization, pushing for more labor rights and higher wages, more spending on

infrastructure and education, and land reform in an effort to break up large holdings of uncultivated land and create thousands of family farms.¹³³ The U.S. began to worry that his agrarian reform efforts threatened U.S. business interests--especially the huge land holdings of the United Fruit Co., which owned more than 500,000 acres in Guatemala and was well-connected in Washington.¹³⁴ The CIA staged a violent overthrow of Arbenz and the rest of his democratically elected government and brought in Col. Carlos Castillo Armas.¹³⁵ In return for his new position as dictator, Armas canceled the land-reform program, imposed press censorship, banned political parties, outlawed most labor unions and leftist political activity, and re-hired the chief of the secret police from a former dictatorship.¹³⁶ The CIA coup ushered in an era of torture, repression and state terrorism that took the lives of close to 200,000 Guatemalans.¹³⁷

The U.S. government supported the repression with arms, training, diplomatic cover and intelligence.¹³⁸ State terror escalated to genocide in the 1980s, when entire Mayan communities were wiped out with the active support of the Reagan administration according to the finding of the 1999 UN sponsored truth commission.¹³⁹

The CIA overthrow in Guatemala was their second attempt at this form of imperialism, having deposed the Iranian government in the early 1950's and instilling Shah Mohammed Reza Pahlavi.¹⁴⁰ These successes set the precedent for later interventions by the U.S. in Cuba, British Guiana, Brazil and Chile.¹⁴¹



Kirsten Bowman

It is precisely because the United States government recognized their ability to covertly interfere with the sovereignty of other nations without global condemnation that they continued to do so throughout Latin America. Never were they faced with the possibility of being held responsible for the actions of those corrupt politicians that they helped to put in place and support through their dictatorships. If indirect forms of responsibility such as complicity in crimes against humanity or genocide had been considered as possible outcomes, the U.S. government may have considered other options before choosing to align themselves with dictator regimes which would impose such violations of human rights.

Throughout the Decades: Examples Abound from the 1960's to Present Day

The examples of imperialistic or neocolonial relationships become even more complex and convoluted throughout the decades. As western interests converge and intersect, competition abounds in the rush to build relationships and place influential leaders at the head of developing nations in an effort to maximize their economic interests. From the Middle East to Africa to Asia, neocolonialism has flourished bringing great benefits to the western world.

East Timor experienced a brutal dictator in General Suharto beginning in 1975 and reigning through 1998. Suharto's vicious control during these years resulted in crimes against humanity and crimes which arguably amount to genocide and the deaths of nearly

one third of the East Timorian population (nearly 200,000 people).¹⁴² The International Commission of Inquiry on East Timor concluded that:

there were patterns of gross violations of human rights and breaches of humanitarian law which varied over time and took the form of systematic and widespread intimidation, humiliation and terror, destruction of property, violence against women and displacement of people. Patterns were also found relating to the destruction of evidence and the involvement of the Indonesian Army (TNI) and the militias in the violations.¹⁴³

Vital, material backing for a crime proportionally greater than the killing in Cambodia under Pol Pot came from the West: principally the US, Britain and Australia.¹⁴⁴ Over the history of Indonesia's illegal reign over East Timor, Australia has the most clandestine relationship with the government of Indonesia. As one of the only countries to recognize *de jure* the incorporation of East Timor into Indonesia,¹⁴⁵ Australia had great interest in the extensive fish stocks and significant oil reserves along the southern coast and in the Timor Gap between East Timor and Australia, and entered into very lucrative agreements with Indonesia to develop those oil deposits.¹⁴⁶

Examples of this situation are boundless. Through 20th century imperialism, the authorities of Britain, Belgium and France gassed, bombed and massacred indigenous populations from Sudan to Iraq, Nigeria to Palestine, India to Malaya, Algeria to the Congo.¹⁴⁷ Not one of these crimes has been prosecuted, and most are not even recognized publicly by the countries who committed them. More disturbing, this form of global criminal action continues on today.

Kirsten Bowman

Present Day: Israel

While the Middle East conflict, which has embroiled Israeli and Palestinian interests in conflict for more than half a decade, is complex and tensely debated it is hard to contest that the United States plays a principal role as a major financial supporter of Israel. Israel receives about one third of the U.S. foreign-aid budget.¹⁴⁸ The United States supplies Israel annually with approximately \$ 3 billion per year, \$ 1.2 billion in economic aid and \$ 1.8 billion in military aid.¹⁴⁹ This statistic is remarkable in light of the fact that Israel is the sixteenth wealthiest country in the world, and the sixth most powerful in terms of military might.¹⁵⁰ This investment serves the interests of the U.S. well. Israel continues to work with the U.S. to defeat the radical Arab nationalist movements long seen as the major opponent to US dominance of the oil-rich states surrounding Israel.¹⁵¹ Fully 99 per cent of all U.S. aid to Israel has been transferred since the 1967 war that annexed the occupied territories. It was after this war that Israel established itself decisively as a sub-regional power in the Middle East.¹⁵² U.S. support for Israel is not only politically convenient, it establishes a base for the most important resource for industrial capitalism - oil.¹⁵³

Throughout the occupation by Israel and the financial and military support by the U.S., debate continues on as to whether Israel or Palestine (or both) act illegally, committing international crimes against each other. An even more pressing concern is the possibility of future developments. Our military, economic and political support enable Israel to



Kirsten Bowman

of this scenario is frightening, and the need for third party accountability has never been as vital.

While each of the above examples does not mirror identically the French involvement in Rwanda before and during the genocide, each does have similarities. Clearly the scenario of neocolonial relationships gone wrong is not isolated to the France/Rwanda relationship. By prosecuting the French for their actions, other western neocolonialists would be put on notice. It is clear that we as a global community owe it to our own humanity to hold each other accountable. If we do not then we must accept our own moral responsibility for the brutal actions committed against humanity.

CONCLUSION

While it is likely that a case could be found against the French actors who participated in the Rwandan genocide whether through the availability of arms, diplomatic support or military participation, this is only one story in a larger picture. This is an example of what can happen when a neocolonial relationship between a wealthy nation interested in amassing even greater wealth and a repressive, unstable regime goes wrong and the repercussions that can ensue. This story also serves as a warning to other nations who find themselves in the precarious situation of supporting regimes that, in the end, they will not be able to control. The implications are serious and under international law, it seems clear that these nations will not only be morally accountable, but could be legally accountable as well. In the end, the Human Rights Watch report on the events sums it up well. "...genocide anywhere implicates everyone. To the extent that governments

Kirsten Bowman

and peoples elsewhere failed to prevent and halt this killing campaign, they all share in the shame of the crime.”¹⁵⁴

ENDNOTES

- ¹ PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUT FAMILIES* 3 (Picador USA 1998).
- ² THOMAS G. WEISS, *MILITARY-CIVILIAN INTERACTIONS: INTERVENING IN HUMANITARIAN CRISES*, (Lanham MD, Boulder CO, New York, Oxford: Rowman & Littlefield Publishers, Inc., 1999).
- ³ SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 380 (Perennial New York, NY 2003).
- ⁴ Pierre-Antoine Souchard, *Lawsuit filed alleging French soldiers had hand in Rwanda genocide*, ASSOCIATED PRESS, Feb. 16, 2005.
- ⁵ Power, *supra* note 3 at 329.
- ⁶ Gourevitch, *supra* note 1, at 95.
- ⁷ *Id.* at 99.
- ⁸ *Id.*
- ⁹ *Id.* at 108-109.
- ¹⁰ The story of events leading up to and including the genocide of 1994, including French involvement is summarized based on limited sources. The following are the relied upon sources for the information, many of whom rely on Gerald Prunier's studies for their theories. See Gerald Prunier, *The Rwanda Crisis 1959-1994; History of Genocide* (1995); see also Gourevitch, *supra* note 1; HRW Report – *Leave None to Tell the Story: Genocide in Rwanda*, March 1999 at <http://hrw.org/reports/1999/rwanda/index.htm#TopOfPage>; Human Rights Watch, *Playing the "Communal Card": Communal Violence and Human Rights 1-17* (1995); Mel McNulty, *French Arms, War and Genocide in Rwanda, Crime, Law and Social Change* 33: 105-129, 2000 at <http://users.skynet.be/wihogora/McNully.pdf>.
- ¹¹ Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 *Yale J. Int'l L.* 365, 387 (1999).
- ¹² *Id.* at 388.
- ¹³ See *id.* at 389.
- ¹⁴ *Id.*
- ¹⁵ Christina M. Carroll, *Article: An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 *B.U. Int'l L.J.* 163, 168 (2000).
- ¹⁶ *Id.*
- ¹⁷ *Id.*
- ¹⁸ *Id.*
- ¹⁹ See S.C. Res. 872, U.N. SCOR, 48th Sess., 3288th mtg., U.N. Doc. S/RES/872 (1993).
- ²⁰ See Carroll, *supra* note 14 at 169.
- ²¹ Gourevitch, *supra* note 1, at 76.
- ²² Human Rights Watch, *Playing the "Communal Card": Communal Violence and Human Rights 1-17* (1995) (noting expansive French monetary and military aid). See also Mel McNulty, *French Arms, War and Genocide in Rwanda, Crime, Law and Social Change* 33: 105-129, 2000 at <http://users.skynet.be/wihogora/McNully.pdf> (the following reporting in this section regarding arms transfers as well as military involvement by France is corroborated in this article).
- ²³ See Gourevitch at 89.
- ²⁴ See *id.* at 93; Frontline: *Rwanda Chronology*, at <http://www.pbs.org/wgbh/pages/frontline/shows/rwanda/etc/cron.html> (last visited April 19, 2004).
- ²⁵ *Id.*
- ²⁶ *Id.*
- ²⁷ See *id.* at 90.
- ²⁸ See *id.*
- ²⁹ See *id.*
- ³⁰ *Id.* at 93.
- ³¹ *Id.*

³² *Id.* at 94.

³³ See HRW Report – Leave None to Tell the Story: Genocide in Rwanda, *Responses of the French, U.S. and Belgian Governments*, March 1999, <http://hrw.org/reports/1999/rwanda/Geno4-7-01.htm>. [hereinafter HRW Report].

³⁴ *See id.*

³⁵ *Id.*

³⁶ *See id.*

³⁷ *See id.*

³⁸ *See id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See id.*

⁴³ *Id.*

⁴⁴ *See id.*

⁴⁵ *Id.*

⁴⁶ *See id.*

⁴⁷ AGNES CALLAMARD, FRENCH POLICY IN RWANDA, in Adelman, HOWARD AND SUHRKE, ASTRI, THE RWANDA CRISIS FROM UGANDA TO ZAIRE: THE PATH OF A GENOCIDE, 38 (London: Transaction Publishers, 1999).

⁴⁸ HRW Report, *supra* note 32 at http://hrw.org/reports/1999/rwanda/Geno15-8-02.htm#P438_141967.

⁴⁹ *Id.*

⁵⁰ *Id.* The full details of French officials cooperation with the Rwandan Hutu army during the Genocides has been documented by Human Rights Watch in detail. *Id.*

⁵¹ *Id.*

⁵² Gourevitch, *supra* note 1, at 154.

⁵³ *Id.* at 155.

⁵⁴ *See id.*

⁵⁵ *Id.*

⁵⁶ *See id.* at 157.

⁵⁷ *See id.*

⁵⁸ *See id.* at 158.

⁵⁹ *Id.*

⁶⁰ *Id.* at 161; *see also* HRW Report, *supra* note 23 at http://hrw.org/reports/1999/rwanda/Geno15-8-02.htm#P438_141967.

⁶¹ While the Rome Statute for the International Criminal Court (ICC) contains statues and provisions under which individuals might be held responsible, Article 11 of the statute states that the court only has jurisdiction over crimes committed after the entry into force of the statute. With no retroactive jurisdiction, the ICC would not work as a forum under which to hold individual French actors responsible.

⁶² M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 356-60 (3d ed. 1996).

⁶³ M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 511-13 (1992).

⁶⁴ One example of this could be Belgium who has not only strong laws regarding the principle of universal jurisdiction, but strong ties to Rwanda based on it's own neocolonial relationships as well.

⁶⁵ It is important to note that French officials may be able to raise certain defenses and issues of diplomatic immunities in order to escape charges being brought against them, but these issues are beyond the scope of this discussion. Further, it is worth noting that the political ramifications of suing the French government make it an unlikely scenario. However, logistically, it is certainly a legal possibility.

⁶⁶ Statute of the International Tribunal for Rwanda, adopted at New York, Nov. 8, 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598 Art. 5. [hereinafter ICTR Statute]

⁶⁷ Kenneth S. Gallant, *Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts*, 48 VLLR 763, 795 (2003).

⁶⁸ *Supra* note 63 at art. 7.

⁶⁹ *Supra* note 64.

⁷⁰ *Supra* note 63 at art. 7.

⁷¹ “The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.” *Id.* at art. 6.

⁷² “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.” *Id.*

⁷³ “The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment. *Id.*

⁷⁴ Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1948).

⁷⁵ Prosecutor v Akayesu (1998) 37 ILM 1399, Int Trib. para. 526.

⁷⁶ *Id.* at para. 527.

⁷⁷ Gourevitch, *supra* note 1, at 3.

⁷⁸ Prosecutor v. Kayishema, Judgment and Sentence, No. ICTR-95-1-T, para. 91 (May 21, 1999).

⁷⁹ *Id.*

⁸⁰ *See id.*

⁸¹ *Id.* at para. 95.

⁸² *Id.* at para. 97.

⁸³ *See id.*

⁸⁴ *Id.* at para. 104.

⁸⁵ *See* Prosecutor v. Serushago, ICTR 98-39-DP, I.L.R. (Int'l Crim. Trib. for Rwanda 1999); Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T (May 21, 1999); Prosecutor v. Nahimana, Indictment, No. ICTR-96-11 (Nov. 15, 1999); Prosecutor v. Barayagwiza, Indictment, No. ICTR-96-19 (Apr. 14, 2000); Prosecutor v. Ngeze, Indictment, No. ICTR-96-27 (Nov. 22, 1999); Prosecutor v. Nahimana, No. ICTR-97-11-I (Sept. 9, 2000).

⁸⁶ *See supra*, note 72 at para. 531-34.

⁸⁷ In full, the tribunal identified the types of complicity as: complicity by procuring means, such as weapons, instruments or any other means, used to commit genocide, with the accomplice knowing that such means would be used for such a purpose; complicity by knowingly aiding or abetting a perpetrator of a genocide in the planning or enabling acts thereof; complicity by instigation, for which a person is liable who, though not directly participating in the crime of genocide, gave instructions to commit genocide, through gifts, promises, threats, abuse of authority or power, machinations or culpable artifice, or who directly incited to commit genocide. *Id.* at para. 537.

⁸⁸ *See id.* at para. 541.

⁸⁹ *See* HRW Report, *supra* note 23.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *See supra*, note 72 at para. 548.

⁹³ *See id.* at para. 547.

⁹⁴ This is only with no other specific facts included. The issues of command responsibility, explored later in this paper might lead to responsibility for failure to act when the actor is in a position of power or responsibility over another.

⁹⁵ *See generally* HRW Report, *supra* note 23. “According to French estimates, their 2,500 elite soldiers, equipped with the best equipment available, saved some 8,000 to 10,000 people at Nyarushishi, another 1,100 at Bisesero and another 6,000 in Gikongoro, a total of approximately 15,000 to 17,000 people. UNAMIR, with its barely 500 men, poorly armed and equipped, protected at one time nearly twice that number. Like members of the U.N., the French could and did save lives when it suited their interests. And, when it did not, they too hid behind excuses of insufficient troops and concerns for their safety or they used a supposed commitment to adhering to the mandate or to preserving neutrality as pretexts for inaction.” *Id.*

⁹⁶ *See id.*

⁹⁷ *Id.*

⁹⁸ Richard P. Barrett and Laura E. Little, *Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals*, 88 Minn. L. Rev. 30, 36 (2003).

⁹⁹ *See Tadic*, *supra* note 96 at para. 196.

¹⁰⁰ *Id.* at para. 202.

¹⁰¹ *Id.* at para. 206.

¹⁰² *Id.* at para. 206.

¹⁰³ *Id.*

¹⁰⁴ Prosecutor v. Krstic, Case No. IT-98-33-T, para. 611.

¹⁰⁵ *Id.*; See also Tadic Appeals Chamber Judgement, para. 227; Furundzija Appeals Chamber Judgement, para. 119.

¹⁰⁶ See *id.*

¹⁰⁷ See *id.*

¹⁰⁸ Article 6(3) of the Statute of the International Tribunal for Rwanda states that the fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

¹⁰⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 86(2), T.I.A.S. No. 17512 (entered into force Dec. 7, 1978) [hereinafter Protocol I].

¹¹⁰ Rome Statute of the International Criminal Court (July 17, 1998), UN Doc. No. A/CONF. 183/9, 37 I.L.M 999, 1017 (entered into force July 1, 2002) [hereinafter Rome Statute].

¹¹¹ See Kayishema, *supra* note 75 at para. 216.

¹¹² See HRW Report, *supra* note 23. Another named with direct contact include Col. Didier Thibault, who clearly admitted that some of the Rwandan government officials that he was working with and protecting might “have blood on their hands”, but insisted that “the legitimacy of this government is not my problem”. Other examples exist throughout this document. *Id.*

¹¹³ *Id.* at para.217.

¹¹⁴ See *id.* at para. 218.

¹¹⁵ See *id.*

¹¹⁶ Rome Statute, *supra* note 65, at art. 28.

¹¹⁷ See Kayishema, *supra* note 75 at para. 222.

¹¹⁸ *Id.*

¹¹⁹ See *id.* at para. 224. Article 6(3) lays out that if a subordinate commits one of the acts referred to in Articles 2 to 4 of the Statute, a superior is criminally responsible if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take reasonable measures to prevent or punish. See ICTR Statute, *supra* note 63 at art. 6(3).

¹²⁰ See *id.*

¹²¹ Julio Godoy, Politics: France Again Denies any Role in the Rwanda Massacre, April 7, 2004 at <http://www.globalinfo.org/eng/reader.asp?ArticleId=29134>

¹²² See Gourevitch, *supra* note 1, at 159.

¹²³ HRW Report, *supra* note 23.

¹²⁴ Godoy, *supra* note 118.

¹²⁵ *Id.*

¹²⁶ *Id.* French journalist Patrick de Saint-Exupery, author of a book on the Rwandan genocide, confirms Dallaire's accusations against French military advisers. *Id.*

¹²⁷ ICTR Statute, art. 6(3).

¹²⁸ STEPHEN SLEMON, POST COLONIALISM THE NEW FACE OF IMPERIALISM, The Toronto Star, March 14, 2000.

¹²⁹ See *id.*

¹³⁰ See generally GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 409-18, 461-63, 814-17 (2000); see also Andrew N. Keller, *Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR*, 12 Ind. Int'l & Comp. L. Rev. 53, 57 (2001).

¹³¹ See Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgement, para. 848, 14 January 2000.

¹³² James Risen, *Documents Reveal CIA Guatemala Assassination Plots; Latin America: Newly Declassified Papers Show that Agency Considered Killing Dozens of Politicians During '54 Coup*, L.A. TIMES, May 24, 1997.

¹³³ Arnold J. Oliver, *U.S. Owes Guatemala More Than an Apology*, July 3, 2004.

¹³⁴ See Risen, *supra* note 131; *see also id.*

¹³⁵ See Oliver, *supra* note 132.

¹³⁶ *Id.*

¹³⁷ See *id.*; *see also* Stephen Kinzer, *Regime Change: The Legacy; Since 1953, U.S. presidents have been toppling other governments. Now, the consequences*, The American Prospect, November 2003.

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¹⁴⁰ Stephen Kinzer, *Ideas and Trends: Iran and Guatemala 1953-1954; Revisiting Cold War Coups and Finding Them Costly*, N.Y. Times, November 30, 2003.

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¹⁴³ Report of the International Commission of Inquiry on East Timor to the Secretary General: U.N. High Comm'r for Human Rights, 54th Sess., Agenda Item 96, P 123, U.N. Doc. S/2000/59 (2000).

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¹⁴⁸ Clyde Mark, *Israel: U.S. Foreign Assistance 3*, available at <http://www.adc.org/IB85066.pdf> (last updated Oct. 17, 2002); Shirl McArthur, *U.S. Tax Dollars at Work: Calculating Foreign Aid to Israel*, <http://www.hotpolitics.com/tax4israel.htm> (last visited March 1, 2005).

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¹⁵⁰ *Id.*

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¹⁵² *Id.*

¹⁵³ *See id.*

¹⁵⁴ HRW Report, *supra* note 32 at http://hrw.org/reports/1999/rwanda/Geno1-3-05.htm#P106_44662.